85-2032

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

—o—

WALTER H. KUPAU

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

PETITION OF WALTER H. KUPAU FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. In view of the prosecution's having been permitted to adduce expert labor law opinion concerning the crucial issue of petitioner's intent as he spoke on the telephone, did the District Court's rejection of defense expert linguistic analysis of the same point constitute an abuse of discretion and offend the Sixth Amendment?

2. Was the District Court's error in supplying a dictionary to the deliberating jury, thereby enabling them to look up the meaning of a word spoken by petitioner and thus relevant to the disputed issue of his conversational intent, harmless beyond a reasonable doubt?

3. Was the District Court's error in allowing an FBI agent to be alone with the deliberating jury to replay an important tape recording, without any record of what was said, harmless beyond a reasonable doubt?

4. Did the District Court's cautionary and curative instructions, delivered in the form of ex parte notes themselves violative of *Fed. R. Crim. P.* 43 and *Rogers v. United States,* 422 U.S. 35 (1975), adequately mitigate the constitutional errors described in questions two and three?

5. Did the cumulative impact of the errors described in questions one through four deprive petitioner of his basic right to defend himself in violation of the Sixth Amendment?

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COURT OF APPEALS OPINION

The opinion, *United States v. Kupau,* is found at 781 F.2d 740 (9th Cir. 1986), and is included in the appendix.

SUPREME COURT JURISDICTION

The judgment sought to be reviewed, *United States v. Kupau,* 781 F.2d 740, is dated January 28, 1986. A petition for rehearing and suggestion for rehearing en banc were rejected on April 17, 1986.

This Court's jurisdiction to review the judgment in question by writ of certiorari is conferred by 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const., *amend. VI*: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

Fed. R. Evid. 702: "Testimony by Experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Fed. R. Crim. P. 43(a): "Presence [of the defendant] required. The defendant shall be present at . . . every stage of the trial including the impaneling of the jury and the return of the verdict. . . ."

STATEMENT OF THE CASE

Introduction. On August 18, 1983, petitioner Walter H. Kupau was indicted on three counts of perjury under 18

U.S.C. § 1621 and four counts of false declarations under 18 U.S.C. § 1623. The case was tried before a jury on November 2, 1983, and verdicts of guilty of the first six counts were returned on November 17, 1983. On February 6, 1984, Kupau was sentenced to imprisonment for two years and to pay fines totaling $10,000.

District court subject matter jurisdiction. Because Kupau was charged with offenses against the laws of the United States, jurisdiction in the district court was proper under 18 U.S.C. § 3231.

Labor-management dispute context. On January 6, 1981, members of Local 745, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter "carpenters"), began to picket several construction projects of C & W Construction Co. (hereinafter "C & W Co."), a non-union construction contractor located on the Island of Maui. Tr. 574. Kupau was at all relevant times the statewide head of the carpenters, headquartered at Honolulu on the Island of Oahu. The prosecution's principal witness at trial was Walter Mungovan, the owner and executive officer of C & W Co. Mungovan's construction projects, in late 1980 and early 1981, were in fulfillment of three contracts, valued at one million dollars, to build residential homes on Maui. Tr. 539. Because of conversations Mungovan had with Maui-based carpenters agents (Tr. 553, 568), Mungovan believed the picketing signaled an effort "to organize my company." Tr. 573.

Mungovan complained to the National Labor Relations Board that the carpenters' picketing was designed to compel him to "sign a union contract." Tr. 119. The jury learned from labor law expert Thomas W. Cestare, officer in charge of the Honolulu NLRB office, that a labor union cannot lawfully conduct picketing designed to organize an employer for more than thirty days without petitioning the

NLRB to hold an election to determine the union question. Tr. 113 Acting on Mungovan's complaint, the NLRB conducted an investigation and sought a district court injunction to stop the picketing. Tr. 121 The district court ordered the carpenters to respond to Mungovan's allegation (Tr. 91, 122-23), and Kupau submitted affidavits, dated February 23, 1981, and March 17, 1981, which yield counts one through three of the indictment. Specifically, Kupau is alleged to have committed perjury when he said:

> Picketing of Mr. Mungovan's projects would have ceased and will cease immediately if Mr. Mungovan conforms to the prevailing area standards whether he is a union or non-union contractor. [Count 1] The objective in Local 745's picketing Mr. Mungovan's construction sites has not involved consideration of organizing or recognition. [Count 2] . . . Since the onset date of picketing of C & W Construction's sites, Local 745's only objective has been to protest substandard wages paid. [Count 3]

The gravamen of counts one through three is that Kupau misrepresented his union's picketing "objective." Kupau's consistent position, then and at his trial in 1983, was that the carpenters' picketing was "informational," that is, was intended only to protest publicly the wages and working conditions at C & W Co. Tr. 1093 The jury learned from labor law expert Cestare that informational picketing of the sort Kupau asserted the carpenters were conducting was entirely lawful, could legitimately be conducted to protest an employer's wages and working conditions, and was not subject to any time limits. Tr. 116, 168-69 Thus the question whether the carpenters' picketing of Mungovan was organizational or informational in nature and intent lay at the heart of the labor dispute and the perjury charges against Petitioner.

During the pendency of the NLRB suit, Mungovan decided to tape record the carpenters in surreptitious fash-

ion. As he put it in response to a question on cross-examination, he undertook to get them "to say that they were . . . attempting to organize [him]." Tr. 640 Taped conversations Mungovan had with William Nishibayashi (Tr. 603-04) and with Ralph Torres (Tr. 598-99), Maui-based officers of the carpenters, were played for the jury at Kupau's trial. Tr. 597, 610 Mungovan also got Kupau on the telephone on February 27, 1981, and that Mungovan-Kupau conversation was the government's most important evidence at trial. Its importance to counts one through three was twofold: (1) there was temporal proximity because the allegedly perjurious affidavits were dated February 23 and March 17, 1981; and (2) although the matter was sharply contested at trial, the government claimed that during that February 27 conversation Kupau revealed his knowledge of the real nature of the picketing.

Nishibayashi and Torres were indicted for perjury and tried in May 1983. Kupau testified in that trial and was cross-examined in connection with the February 27, 1981, Mungovan-Kupau telephone conversation tape. At one point the Nishibayashi-Torres prosecutor asked: "Is it not true Mr. Kupau, that [in that conversation] . . . all you were talking about with Mr. Mungovan was signing a contract?" Count four of the indictment charged that Kupau's answer, "Not a union contract, no" was a false declaration. Count five alleged as another false declaration in the same piece of testimony Kupau's statement, "[B]ut it *was not my intention in that conversation* with him to sign a union contract . . ." (Emphasis added.) Count six was to the same effect. The recording of the February 27, 1981, conversation between Mungovan and Kupau was thus the subject matter of counts four through six. The entire case against Kupau would turn on an assessment of his state of mind while he spoke to Mungovan and Mungovan's secret tape recorder.

State of the evidence. Taken together, the Mungovan testimony and the Mungovan-Nishibayashi and Mungovan-Torres tapes constituted evidence sufficient to support a jury determination that the objective of Nishibayashi, Torres, and the Maui pickets was indeed to organize C & W Co. In other words, the actual falsity of Kupau's statements, at least insofar as Local 745's true intent could be ascertained, was adequately proved by the government. But the main factual issue at trial was *Kupau's* intent and as to that vital element of each of the six counts the evidence clashed. Kupau stoutly maintained at trial, as he had in his previous testimony, that to his knowledge the C & W Co. picketing was informational and designed to protest wages and working conditions. Tr. 1088-1105, 1149-50 As the trial judge put it in denying a motion for judgment of acquittal, "[T]he real issue is . . . the state of mind of the defendant at the time the statements were made." Tr. 1156

The Mungovan-Kupau tape. The gist of the conversation follows:

> Mungovan rings Kupau and says he understands that "you would like to talk to me."
>
> Kupau says: "My understanding is previously this is the way I got it. You're interested in signing the union agreement by deferring certain dates on certain projects or something like that. Now . . . if that was still your intention, we can settle this thing over a cup of coffee in 15 minutes."
>
> Mungovan retorts that after he obtains "some commercial jobs" he'd "be more than happy to sign the paper." Regarding his recent conversation with Nishibayashi, Mungovan says, "I believe in the [union] . . . so it wasn't like I was saying, hey forget it brah, I'm not going to sign."
>
> Kupau responds he understood, from Nishibayashi, that to be Mungovan's position.
>
> Mungovan reiterates that he doesn't want to "sign the paper" right now and wonders why "you guys come

on so heavy with me when there is a lot of guys around . . . that are doing big commercial jobs. . . ."

Kupau responds there's a "[W]hole bunch of circumstances involved with each particular contractor and . . . that's why some are getting hit and some are not, but we are doing a hell of a lot . . . as far as organizing is concerned on the Islands."

Mungovan persists: "I hope that you don't think that I want to buck you guys. . . ."

Kupau says, "No, no . . . I'm not . . . I don't have the capacity to sign an agreement. . . ."

Mungovan presses the point: "I was looking for a date, you know, in the future when, you know, when it would give me enough time, you know . . . I'm just starting out, you know, and ever since the beginning I said yes I'd be willing, you know, I want I have every intention to sign the agreement."

Kupau capitulates: "[L]et me tell you what it probably is going to take to settle this. . . . In order to settle this whole beef, the picket lines off both sides withdraw we not, we are not worried about the National Labor Relations Board . . . in order to settle the beef is going to have to be some type of agreement consummated and effective at some future date on all new projects. . . ."

The prosecutor spotlighted the tape in his opening statement:

> You will hear that Mr. Kupau . . . in that conversation said: In order to settle—in order to—let me tell you what it is probably going to take to settle this. . . . [I]t's going to have to be some type of agreement consummated and effective at some future date on all new projects. . . . Tr. 65-66

The Mungovan-Kupau tape was received in evidence and played during the Mungovan testimony. Tr. 626-27 Jurors were furnished transcripts to read along as the tape recording was played. Tr. 626-27, 610 Mungovan was permitted to offer his interpretation of the dialogue:

Q. (By prosecutor) Now further down when [Kupau] says: In order to settle the beef there's going to have to be some type of agreement consummated and effective at some future date on all your projects prior to you negotiating or bidding on it. What did you interpret the word "agreement" to mean there?

A. (Mungovan) A union contract. Tr. 628-29

The Mungovan-Kupau tape was riveted into the jury's consciousness throughout the trial. Thomas W. Cestare, the Honolulu NLRB chief, was qualified as an expert in labor law and collective bargaining agreements. Tr. 110 Cestare believed that the carpenters' picketing was organizationally motivated. Cestare was shown the transcript of the Mungovan-Kupau recording. Tr. 150 He had previously listened to the tape recording. The prosecutor read from the transcript: "[I]n order to settle the beef there's going to have to be some type of agreement consummated and effective at some future date on all new projects," and asked Cestare "if the word 'agreement' as used in that paragraph has a generally accepted meaning in the field of labor management relations?" Tr. 155-56 There was an objection based on a defense contention that the prosecutor was actually seeking Cestare's opinion of Kupau's intent. Tr. 156 The objection was overruled:

THE COURT: This goes to the Government's attempt to show state of mind. Objection overruled.

BY [Prosecutor]:

Q. What is your understanding in the context of this that the word "agreement" means?

A. A contract, a collective bargaining agreement.

Q. A union contract?

A. Yes. Tr. 157

After cross-examination on the point (Tr. 176-79), the prosecutor drove Cestare's interpretation of Kupau's state of mind home on redirect:

Q. . . . Now when you gave your opinion about the meaning of "agreement" as employed by Kupau on direct and when [defense counsel] was cross-examining you about that, when you rendered your opinion was that based on just that one paragraph there?

A. No, it wasn't.

Q. What was it based on?

A. It was based on the entire conversation. Tr. 182

The Government thus employed two witnesses, Cestare the expert and Mungovan the participant, to opine and elaborate for the jury defendant Kupau's intent on the telephone in 1981.

A final flourish was furnished by the government near the conclusion of its case-in-chief when the prosecutor staged a dramatic reading of some 32 pages (Tr. 799-812, 822-40) of Kupau's former testimony, including that alleged to be false in counts four through six. Playing the role of prosecutor and questioner in the former proceedings, the trial prosecutor put the questions to an FBI agent who responded in Kupau's words. So:

Q. "Q. Now, on the next page, on page 4, where you say, 'In order to settle this whole biff [sic], the picket lines off both sides,' are you telling Mr. Mungovan in that—were you talking there and in the next one, in order to get the pickets off, he has to sign up with the union?"

A. "A. I was—you have to understand that I was—you have to understand that I was responding during this entire conversation to Mr. Mungovan's suggestion, an offer to the Carpenters' Union, to sign a union contract with us. . . ."

Q. "Q. Doesn't it say, 'In order to settle the beef, there's going to be some type of agreement consummated and effective at some future date and all new projects'—"

A. "A. That does not mean—that does not mean—that's not right." Tr. 810-11

Following this dramatic reading, the prosecution rested, urged the Mungovan-Kupau tape in opposition to the motion for judgment of acquittal (Tr. 861-64), employed it repeatedly in cross-examination of Kupau (Tr. 1139-50), and again emphasized it in summation:

> Ladies and gentlemen, I suggest that when you read this transcript, when you listen to the tape . . . that whatever else was going on in this case, that conversation was about a union contract. . . . Tr. 1266
>
> He [Kupau] said essentially, "Look, enough conversation. The only way to settle the beef is to have some kind of agreement consummated. . . ." end of discussion. Tr. 1278

The defense evidence. Kupau's defense was that, whatever the intent of Nishibayashi, Torres, and the Maui pickets, he always believed the picketing was informational and his intent, at the time of the affidavits and the Mungovan-Kupau conversation, was not to induce or compel the adoption of a union contract. Tr. 1047, 1088-92, 1097-98, 1101-05 Kupau testified he had a call from Nishibayashi who said Mungovan had promised to telephone Kupau. Tr. 1044 Nishibayashi also told Kupau that he thought Mungovan "was interested in signing an agreement to pay area standard rates." Tr. 1043 Accordingly, when Mungovan telephoned on February 27, 1981, Kupau, because of expectations generated in talks with Nishibayashi, believed that Mungovan was prepared to agree to pay wages adequate to induce Kupau and the carpenters to terminate the picketing. Tr. 1088-89 Kupau thus provided a plausible explanation for the by-then-infamous "going to have to be some type of agreement consummated" remark to Mungovan, and that explanation was backed up by Nishibayashi. Tr. 315, 321, 334-39, 348

The flaw in the prosecution's linchpin was thus adumbrated: Mungovan and Kupau, on February 27, 1981, might have been speaking with different agendas and assump-

tions. Mungovan believed that the carpenters were trying to organize him (Tr. 573) and was motivated to obtain evidence to that effect. Tr. 586, 640, 713 Kupau, on the other hand, unaware of the secret tape recorder, had been given to believe that Mungovan was prepared to discuss an undertaking of some sort in satisfaction of the carpenters' contentions. "Settle the beef"? "Some type of agreement consummated"? The defense was that these phrases were inherently ambiguous in context.

In addition to character testimony (Tr. 1012-18), the defense mounted two efforts to substantiate and support Kupau's testimony, but both were frustrated by adverse rulings of the court. The defense sought to elicit opinion testimony from Dennis W. S. Chang, the lawyer who drew up the affidavits that formed the predicate for counts one through three. Tr. 430-32 Chang was the carpenters' lawyer at all relevant times. Tr. 429, 438 After testifying that he assisted Kupau in preparing the challenged affidavits, Chang was examined by defense counsel as follows:

> Q. Now when you assisted Mr. Kupau in the preparation of the affidavit[s] . . . did you believe that Mr. Kupau believed this to be true?
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: The grounds?
>
> [Prosecutor]: Your Honor, there's no basis for asking a witness whether he believed that someone was telling the truth when he said something.
>
> THE COURT: Well, it's also irrelevant as to what —
>
> [Prosecutor]: Yes.
>
> THE COURT: As to what his belief is. I'd sustain it on that ground.
>
> [Prosecutor]: Yes, Your Honor. Tr. 448

To counter the opinion testimony of labor law expert Cestare, the defense proferred an expert in linguistics, Dr.

Roger Shuy. The offer of proof was that Dr. Shuy, whose specialty in the field of linguistics is discourse analysis,[1] would testify as follows:

> Dr. Shuy will analyze the conversations between Mr. Kupau and Mr. Mungovan . . . and he will give us some indication as to intent, he will give us some indication as to ambiguities within the particular conversation, and he will supply us with some of the scientific evidence to determine what the people meant during the course of their conversations. . . .
>
> Also, the intent. Dr. Shuy's testimony in this particular case will indicate that, as far as the analysis in talking about — in the conversation, Mr. Kupau was talking about one thing, and Mr. Mungovan apparently is talking about something else. So his testimony is offered as an expert witness to assist the jury in ultimately determining the issues of this particular case. Tr. 986-87

The court denied the proffer because, "[T]here is no confusion as to what was said." Tr. 989 Defense counsel reminded the court that the prosecution's expert, Thomas Cestare, had been permitted "to testify as to the meaning of certain phrases" (Tr. 989), but the court adhered to its denial. "The conversation is not that confusing that it would require an expert . . . . It is clear and apparent on its face." Tr. 989 Defense counsel thereupon requested permission "to put Dr. Shuy on the witness stand to give the Court an offer of proof . . . because this is a specialized field." Tr. 990 That request was also denied. The court adhered to its exclusionary ruling on the ground that the expert testimony was unnecessary and hence irrelevant. Tr. 989, 990-92, 993.

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[1] The technique of discourse analysis was described in petitioner's written offer of proof as to the testimony of Dr. Roger Shuy. It was also discussed in some detail in petitioner's brief in the Court of Appeals.

Jury deliberation irregularities. After a seven-day trial jury deliberations spanned five days. During its deliberations the jury sent fifteen notes to the trial judge. Several of the notes concerned trivial matters: "We would like to adjourn today at 4:30 p.m." "May we have a blackboard, chalk, and an eraser?" Several of them were important.

On the first day of deliberation, November 10, 1983, the jury sent the following note to the judge: "We would like to request a copy of the judge's instructions to the jury." Without notice to counsel or the accused, the court complied and transmitted the instructions with a return note: "I am in receipt of your note . . . attached hereto is a copy of the court's instructions to the jury as read to you on this date."

November 10 saw another jury note asking:

Could we please have the following:

1. List of the witnesses and the order they appeared [*sic*]?
2. Masking tape?
3. Transcript of present trial?

Thank you.

Again without notice to counsel or the accused, the judge responded by note as follows:

Members of the jury:

I am in receipt of your note . . . and respond as follows:

1. List of witnesses is attached.
2. Masking tape accompanies this note.
3. A copy of the transcript for this trial cannot be provided. Please be informed that it would take several weeks for the court reporters to transcribe their notes for the entire trial. You are therefore requested to recollect to the best of your ability the testimony in this trial.

/s/ [The trial judge]

On the second day of deliberation the jury started out with a 9:25 a.m. note requesting a number of trivial items

plus "A list of descriptions of the transcripts before us." Responding again by ex parte note, the judge told the jury he had consulted "with the attorneys" and they wanted to know what the jury meant by the words "transcript" and "description" in their note. Rather than respond to that inquiry, the jury sent a second note at 10:30 a.m. requesting "the lists of the plaintiff's and defendant's exhibits with numbers, dates, and a brief description. . . ." At that point the court decided to hold a hearing.

Court convened on the second day of deliberation with the trial judge remarking "[H]ow much of a confusion the jury seems to be having now with reference to their recollection of the evidence of the case here." Tr. 1364 During a colloquy with counsel concerning disposition of the day's first two notes, a third was delivered:

> Please refresh our memory . . . who was witness Gordon Yanagawa (his present and/or past working position for whom?)? Also the same for Dennis Yoshida?
>
> Would you please furnish someone to play the reel-to-reel tapes for us?
>
> Could you please tell us the job titles and companies connected with witness William Botelho, Jack Craig, Don Horio, James Westlake.
>
> Thank you.

The jurors were then brought into the courtroom and the three notes were addressed by the court and counsel. Tr. 1378-90 The court took up the request to have tape recordings played and discovered that the jury wanted to hear only the Mungovan-Nishibayashi and Mungovan-Torres tapes. Tr. 1391 The court also announced that FBI agent Hilton Lui would be present with the jury to play the tapes (Tr. 1368, 1376), that the tape playing would occur in the courtroom, and that the courtroom would be cleared of everyone else except agent Lui and the jurors. Tr. 1376, 1394 The defense objected to this pro-

cedure because agent Lui sat with the prosecutor at counsel table throughout the trial. Tr. 1368, 34, 106, 503, 595-97 The court ignored the objection (Tr. 1369) and delivered the following cautionary instruction to the jury before clearing the courtroom: "The technician in this case will be Mr. Hilton Lui, and . . . . he cannot answer any questions, so don't even talk to him. He'll just be here like a non-entity. And he can't comment as to any evidence." Tr. 1393 The hearing was terminated, and no further record proceedings took place prior to verdict on November 17.

The jury transmitted two notes on November 15, the third day of deliberations. The first note came at 10 a.m.: "Could we please have a dictionary?" Without consulting counsel, the judge gave them one. Appendix at 10 The second note read:

> Could we please listen to the enhanced version of the tape between Mr. Mungovan and Mr. Kupau of February 27, 1981—Defendant's exhibit 20 and Government exhibit 35 after lunch? (Approx. 2 p.m.)

The court responded by ex parte note:

> Members of the jury:
>
> Pursuant to your latest note of this date, you are advised that the enhanced version of the Mungovan/Kupau tape will be played as you have requested with the same technician in the person of Hilton Lui, providing the technical assistance in this case. You are cautioned as previously, that agent Lui will not be allowed to answer any questions, and his presence during the time of the replay will only be for the purpose of technical assistance.
>
> /s/ [The Trial Judge]

There is no further record of this matter, nor is there any record of what, if any, instructions the court gave to agent Lui. The record is replete, however, on the dictionary delivery episode.

On November 16, the fourth day of jury deliberations, defense counsel received a telephone call from the judge's law clerk advising that the dictionary had been delivered. The defense objected.[2] Meanwhile, the court had sent the following ex parte note to the jury.

> Pursuant to your request . . . you have been provided with a dictionary. You are instructed, however, that where the court has provided you with definitions and explanations of terms in its instructions to you, those definitions and explanations must control. You must not resort to the dictionary definition for guidance in interpreting the terms defined for and explained to to you in the court's instructions.

Later, however, the court reconsidered and sent another ex parte note to the jury "removing the dictionary" and instructing "that you must disregard completely any and all definitions obtained from its use."

On November 17 the jury had a verdict and the court convened itself with all parties present, asked the foreperson to rise and hand the verdict to the clerk, and then invited counsel to make his record on the dictionary issue. Tr. 1399 Defense counsel objected to the entire "procedure that was adopted by the court in handling the messages from the jury" as violative of due process. Tr. 1400 Counsel specifically objected to the court's having employed the telephone because it deprived the parties of the opportunity to make a contemporaneous record of their reactions and objections to the proceedings. Tr. 1400 Moreover, noted counsel, the interjection of the judge's law clerk between counsel and the court obfuscated communications. Defense counsel made clear that he repeatedly objected to the telephonic procedure and the failure of opportunity "to speak with the court personally to give the

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[2] Affidavit of defense counsel, dated November 25, 1983, attached to Motion for New Trial, CR 69.

court my personal views with regard to the response to a certain question." Tr. 1400 Counsel summed up: "Now it's difficult for me to present to the court at this time the specific objections with regard to time and place, and that is why I object to the procedure." Tr. 1402

Prior to hearing tne verdict, the court noted that the law clerk procedure was employed because the judge was trying another case. The court also commented that the clerk "contacted both sides on each and every one of the nine specific substantive notes from the petit jury." Tr. 1404 The verdict was taken and the trial was complete. Tr. 1407

Post-trial record making. In retrospect it becomes apparent that none of the parties, perhaps not even the court, was aware at verdict time of the entire course of events between November 10 and 17, 1983. Indeed, the absence of a record forestalls the achievement of such an awareness even now. Defense counsel filed a motion for new trial and attached affidavits. One allegation was that the first communication from Connie Jones, the judge's law clerk, related to the "description of the evidence" note and was received on November 14, the second day of jury deliberations. Counsel's allegation thus leads to the conclusion that none of the first day's notes, including the request for and denial of a trial transcript, was considered "substantive" enough to call for adversary treatment or even notice to counsel. That allegation has never been questioned or contradicted. The prosecutor filed an affidavit on December 27, 1983, and averred that he had interviewed six jurors and taken the affidavits of three and that probably the dictionary definitions were obtained for only two words: "response" and "consummate." On December 27 the District Court held a hearing on the defense motion but took no evidence.

The District Court denied the motion for a new trial and issued a memorandum opinion on February 3, 1984, (Appendix at 1). One of the court's findings was that it employed the Connie Jones communication network "whenever" it received a jury communication (Appendix at 3), but that finding is refuted by the court's own statement, on November 17, 1983, that it employed Ms. Jones only for "nine specific substantive notes" of the fifteen it received. Tr. 1404 The District Court addressed the dictionary point vaguely, conceding that the decision and delivery were accomplished "without first consulting either counsel." Appendix at 4 Based on the affidavits, the court found that the jury looked up only "the words 'response' and 'consummate,' " and held that any error it made in this matter was harmless beyond a reasonable doubt. Appendix at 5, 10-11, 13

In summary, Kupau's jury sent fifteen notes, of which only three were treated on the record. The other twelve occasioned eleven notes that the judge delivered (or had delivered) to the jurors.[3] All eleven of these communications occurred in the absence of Kupau and counsel. Some were discussed with counsel via the Connie Jones network and some were not. There is no record of any of these discussions. The post-trial affidavits alleged that counsel repeatedly and unsuccessfully objected to the court's procedure, and the court's memorandum opinion does not dispute those allegations.

Appeal to the Ninth Circuit. Petitioner's appeal to the U.S. Court of Appeals for the Ninth Circuit raised three points: (1) that jury deliberations were contaminated, in violation of the Sixth Amendment, by the delivery and

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[3] The Court of Appeals set forth the contents of ten of those notes and the District Court's responses in an appendix, see 781 F.2d at 746-47.

use of the dictionary, the FBI agent's presence, and the ex parte judicial instructions and communications, and that the errors were not harmless beyond a reasonable doubt; (2) that the District Court abused its discretion under *Fed. R. Evid.* 702 in rejecting the testimony of the defense linguist; and (3) that the "cumulative impact [of these errors] deprived Kupau of his Sixth Amendment right to defend himself."

The Court of Appeals affirmed the judgment of the trial court, *United States v. Kupau*, 781 F.2d 740 (9th Cir. 1986). The opinion is reprinted in the appendix. Appendix at 17 Petitioner timely petitioned for rehearing *en banc*, and his petition was denied by order on April 17, 1986.

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ARGUMENT

I. THE COURT OF APPEALS' HOLDING THAT THE REJECTION OF THE DEFENSE EXPERT LINGUIST'S TESTIMONY WAS NOT MANIFESTLY ERRONEOUS CONFLICTS WITH DECISIONS IN THE THIRD AND FOURTH CIRCUIT COURTS OF APPEALS AND OFFENDS THE SIXTH AMENDMENT.

The ultimate issue for the jury was petitioner's intent as he conversed on the telephone on February 27, 1981. The offer of proof was that the expert linquist, whose specialty in the field of linguistics was discourse analysis,[4]

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[4] Although not challenged in the District Court, the technique of discourse analysis was presented to the Court of Appeals and explicated as a "generally accepted explanatory theory within the field of linguistics." See e.g., Brown & Yule, *Discourse Analysis* (1983).

The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, in its recent *Executive Summary of Report on FBI Undercover Operations* 7 (April 1984), points out that "linguistic analysis . . . [is needed w]here one of the participants to a conversation has a clear agenda [and the other doesn't because] . . . there is an understandable tendency to assume that the other participant understands and shares this intention and thus accords the proper interpretation to the words utilized by him."

would speak to the very point. The trial court ruled that the proffered testimony was unnecessary in the sense that the taped conversation was "not that confusing [and] clear and apparent on its face." Petitioner urged the Court of Appeals to declare an abuse of discretion but the court, without extended discussion of the point, decided that the District Court's rejection of the proffer "was not manifestly erroneous," 781 F.2d at 745.

This Court has not construed *Fed. R. Evid.* 702, governing the reception of expert testimony, but the courts of appeals have generally held that trial courts have broad discretion in the matter, *e.g., United States v. Fleishmann,* 684 F.2d 1329, 1335 (9th Cir.), *cert. denied,* 103 S. Ct. 464 (1982). The Advisory Committee's Note to Rule 702, quoting Dean Ladd, recommends that the exercise of discretion take into account "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment [by experts]." Could the jury have used help in petitioner's case? There are two measures of petitioner's jury's need for expert assistance of the sort the defense offered. The first is that the prosecution was permitted to adduce lay and expert opinion on this very matter. Mungovan testified that he interpreted the word "agreement" in petitioner's "there's going to have to be some sort of agreement consummated" remark as referring to a union contract. And Mr. Cestare, the prosecution's labor law expert, over objection made the same point.

The Court of Appeals argued that Cestare merely "gave his explanation of the meaning of certain labor law terms used by Kupau in his taped conversation with Mungovan," whereas the defense expert "sought to interpret language in ordinary usage," 781 F.2d at 745. But the record is to the contrary:

Q. What is your understanding *in the context of this* [conversation] that the word "agreement" means?

Cestare: A contract . . . .

Q. A union contract?

Cestare: Yes

* * *

Q. . . . Now when you gave your opinion about the meaning of "agreement" as employed by Kupau . . . [w]hat was it based on?

Cestare: *It was based on the entire conversation.*

[Emphasis added]

Cestare interpreted petitioner's intended usage of the term "agreement," and that was the ultimate issue in the case.

In *United States v. Sellers,* 566 F.2d 884, 886 (4th Cir. 1977), the court held that the discretionary control over expert testimony "may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." The *Kupau* holding conflicts with *Sellers,* which involved expert interpretation of photographs, and also with *Breidor v. Sears Roebuck & Co.,* 722 F.2d 1134 (3d Cir. 1983) (expert opinions concerning origin and cause of fire). See also *Goldberg v. National Life Ins. Co.,* 774 F.2d 559, 565 (2d Cir. 1985) (dictum). For a thoughtful discussion of *Fed. R. Evid.* 702's criterion of helpfulness, see *United States v. Downing,* 753 F.2d 1224 (3d Cir. 1985).

The second measure of need for expert discourse analysis is revealed in petitioner's jury's behavior. The jurors heard about the Mungovan-Kupau conversation in the prosecutor's opening, in Mungovan's and Cestare's

testimony, and in summation. The entire conversation was played for them as they read along with transcripts. There was the dramatic reading also. The "going to have to be some type of agreement consummated" sentence was repeated to the jury no fewer than thirteen times during the trial! Yet the jury deliberated five days, sent nine substantive notes to the judge, asked for a replaying of the Mungovan-Kupau tape, and sought and obtained a dictionary to look up "consummate," the key modifier in the key sentence in the key conversation. Can a more eloquent expression of need be imagined?

The Sixth Amendment's compulsory process clause, reasons Westen in *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 180 (1974), "rests on the premise that a major imbalance of advantage in favor of the state with respect to the presentation of its case through witnesses is likely not only to be unfair, but to frustrate the ultimate pursuit of truth." Westen concludes that the clause requires a "basic equilibrium" between the prosecution and the accused in the presentation of witnesses and evidence. Such a balance of advantage is reflected in many of the Court's most important Sixth Amendment cases, see, *e.g., Davis v. Alaska,* 415 U.S. 308 (1974) (confrontation); *Chambers v. Mississippi,* 410 U.S. 284 (1973) (compulsory process and confrontation); *Smith v. Illinois,* 390 U.S. 129 (1968) (confrontation); *Washington v. Texas,* 338 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (right to counsel). Speaking of the Sixth Amendment's cluster of accused's rights, Justice Harlan once observed: "[They] constitutionalize the right to a defense as we know it, a right not always enjoyed by the accused." *California v. Green,* 399 U.S. 149, 176-77 (1970) (concurring opinion). Petitioner's case, we submit, is at the heart of the Sixth Amendment.

II. CONTAMINATION OF A DELIBERATING JURY BY EX PARTE DELIVERY OF A DICTIONARY AND BY AN FBI AGENT'S PRESENCE, COUPLED WITH INEFFECTIVE, EX PARTE "CURATIVE" INSTRUCTIONS THEMSELVES VIOLATIVE OF FED. R. CRIM. P. 43, DEPRIVED PETITIONER OF HIS RIGHTS TO AN IMPARTIAL JURY, TO CONFRONTATION, AND TO THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT, AND THE ERRORS WERE NOT HARMLESS.

This point treats three separate but related jury deliberation irregularities that likely affected the outcome of petitioner's trial. All three were presented to the Court of Appeals, and in each instance that court held that the error was harmless. We submit that this decision so far departs from an acceptable course of judicial proceedings as to invite the exercise of this Court's certiorari jurisdiction, and suggest that the questions presented, implicating as they do the proper conduct of jury deliberations in the federal courts, constitute important and recurring issues of federal law that deserve to be settled by this Court.

A. The deliberating jury's acquisition and use of a dictionary must be viewed as an instance of contamination by extrinsic, unconfronted fact rather than as a mere supplemental, ex parte instruction.

The Court of Appeals relied on *United States v. Birges*, 723 F.2d 666, 670 (9th Cir.), *cert. denied*, 104 S. Ct. 1926 (1984), a bombing case in which a deliberating jury's use of a dictionary was challenged as "a supplemental instruction, requiring counsel to be informed and defendant to be present, pursuant to *Fed. R. Crim. P.* 43." In such a case the danger connected with dictionary access is that the jury will look up legal terms contained in the indictment or employed in the court's instructions and thereby erroneously vary the meaning of the law. Compare *United States v. Griffith*, 756

F.2d 1244 (6th Cir.) *cert. denied,* 106 S. Ct. 114 (1985) (deliberating jury looked up meaning of statutory language).

In this case the jury looked up the meaning of "consummate." "[I]n order to settle the beef," Kupau said to Mungovan, "is going to have to be some type of agreement consummated and effective at some future date." The entire case against petitioner boiled down to whether the word "agreement" in that sentence was intended to connote a union agreement, as the prosecution contended, or some other type of agreement, as petitioner maintained. Yet it contained an ambiguity to any juror who was unacquainted with the meaning of "consummate" or who was unsure whether the word might not have a special meaning in labor relations terminology. "Consummate" was completely ignored by the parties at trial, and so the jurors asked for a dictionary. The meaning of "consummate" in this context is relevant factual material, not law, and its presentation to the jury that needed to know what petitioner meant was an instance of contamination by unconfronted fact.

B. The deliberating jury's use of a dictionary to define a word relevant to the merits of the case against petitioner violated the Sixth Amendment.

The Court of Appeals appears to have so held, in view of its citations to *United States v. Littlefield,* 752 F.2d 1429 (9th Cir. 1985), and *Gibson v. Clanon,* 633 F.2d 851 (9th Cir. 1980), *cert. denied,* 450 U.S. 1035 (1981) (both cases involving jury contamination by extrinsic material) and its recognition that "[t]he Government had an obligation to prove that the presence of the dictionary was harmless beyond a reasonable doubt," 781 F.2d at 744.

The Court's cases support such a holding, *Parker v. Gladden,* 385 U.S. 363 (1966) (bailiff to sequestered juror: "Oh, that wicked fellow [referring to defendant] . . . is guilty"); *Remmer v. United States,* 347 U.S. 227 (1954)

(juror received anonymous bribe offer); *Patterson v. Colorado,* 205 U.S. 454 (1907) (Holmes, J.); *cf. Irwin v. Dowd,* 366 U.S. 717 (1961) (prejudicial publicity). The *Parker* Court held that the bailiff's remark was governed "by the command of the Sixth Amendment" because the evidence against the accused should be adduced in the courtroom "where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 385 U.S. at 364. Recent applications in the courts of appeals are *United States v. Tebha,* 770 F.2d 1454, 1456 (9th Cir. 1985) (evidence of chemical analysis of heroin not presented at trial); *United States v. Perkins,* 748 F.2d 1519, 1533 (11th Cir. 1984) (juror had or asserted personal knowledge of defendant); *United States v. Barnes,* 747 F.2d 246, 250 (4th Cir. 1984) (suppressed material mistakenly delivered to jury); *United States v. Delaney,* 732 F.2d 639 (8th Cir. 1984) (jury foreman acquired relevant knowledge at police station). The only issue in such a case is the application of the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California,* 386 U.S. 18 (1967). We discuss the Court of Appeals' harmless error holding in subpart D *infra.*

C. The Court of Appeals' treatment of the contamination-by-FBI-agent point conflicts with a leading decision in another federal circuit and so far departs from accepted judicial proceedings as to call for an exercise of this Court's power to clarify federal law.

The plain fact is that an FBI agent who sat at the prosecutor's side during the trial was alone with the deliberating jury to play tape recordings for an unknown period of time without any record of what was said. The constitutional concern here is potential contamination and insidious erosion of juror impartiality even without direct contamination. Justice Stewart made the point in *Turner v. Louisiana,* 379 U.S. 466, 472 (1965): "Any judge who has sat

with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Turner,* in which two deputy sheriffs, also prosecution witnesses, were in "close and continual association" with a sequestered jury, was a much stronger case than this one, but the point is similar. In addition, as the Court of Appeals recognized, 781 F.2d at 743, the tape-playing episode was a "stage of the trial" at which the defendant's presence was required under *Fed. R. Crim. P.* 43.

In this respect *Kupau* is a virtual carbon copy of *United States v. Florea,* 541 F.2d 568, 572 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977), where the court announced a *per se* rule:

> [W]ithout prior stipulation a trial court should not permit any unauthorized person—especially one associated with either prosecution or defense—to communicate with or otherwise have any contact with a jury in any proceeding. If such contact is necessary, it should be under the personal supervision of the court. We determine that a *per se* rule is necessary here because although the danger of improper influence inheres in every contact between an interested party and a jury, actual prejudice may be difficult to establish.

The error was harmless in *Florea,* but there the presence of a court clerk who testified that no conversations took place was the equivalent of a verbatim record.

In petitioner's case the Court of Appeals assumed that the judge's admonition not to communicate was followed: "There is no indication that the instructions were not followed. There is only the potential danger of outside influence on the jury deliberations and the lack of the presence of the judge, counsel, or a reporter to verify that nothing untoward did occur." 781 F.2d at 742. The court added that, "In hindsight it would have been better to have run the machine in open court with the reporter, the judge, counsel, and the defendant present," *id.,* but such a wistful observation contrasts sharply with the Sixth Circuit's

per se rule. And the "instructions" that support the Court of Appeals' harmless error holding were themselves tainted, see the discussion in the next subpart.

D. The harmless error holdings on the contamination-by-dictionary and contamination-by-FBI-agent points rest on cautionary instructions that were themselves violative of Fed. R. Crim. P. 43, and in this particular the holdings conflict with Rogers v. United States, 422 U.S. 35 (1975), and its progeny.

The Court of Appeals decided that the error in permitting the FBI agent and the deliberating jurors to review critical evidence together in the absence of the defense was harmless beyond a reasonable doubt "given the court's emphatic cautionary instruction," 781 F.2d at 743. And it quoted and relied on the "cautionary and curative instructions" accompanying the dictionary delivery and retrieval in support of its harmless error holding on that point.[5] Since the trial court did not conduct an evidentiary hearing (other than receiving affidavits to the effect that the jurors looked up only the meanings of "response" and "consummate"), those holdings must stand or fall on the validity and efficacy of the instructions.

The dictionary was delivered ex parte, and the "cure" was by ex parte note. Even assuming that the curative note, which urged complete disregard of "any and all definitions," was one of the nine "substantive" notes that the trial court's law clerk discussed on the telephone with counsel, there is no record of such a discussion and hence no

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5 The harmless error holding on the dictionary point is flawed in two other respects: (1) it relies on the District Court's assessment of the error as harmless, but the District Court's decision was based on the conclusion that the words the jury looked up did not conflict with the court's instructions, see the District Court's Findings of Fact and Conclusions of Law at 11-12 (appendix); and (2) the Court of Appeals itself asserted that "consummate" was not "critical in this case," 781 F.2d at 744, and that assertion can hardly withstand examination.

consent to the procedure. Moreover, the note had two fatal deficiencies: (1) It was preceded by a more permissive note that advised jurors only that the court's charge was paramount to dictionary definitions, thus impliedly sanctioning the search for the meaning of "consummate," and since neither note bore any time notation or other evidence of chronology, and since the second note did not countermand the first, it cannot confidently be assumed that the jurors disregarded what they had read about "consummate"; and (2) It was a written note, delivered and read in an unknown manner, and it carried none of the formality, focus, and emphasis that attend live courtroom proceedings.

The cautionary instruction aimed at sanitizing the tape-playing episode also took the form of an ex parte note: "[A]gent Lui will not be allowed to answer any questions, and his presence during the time of the replay will only be for the purpose of technical assistance." A good deal of intercourse between the agent and the jurors that would not violate the letter of that admonition (even assuming all jurors read it) can be imagined. The Court of Appeals relied on the cautionary instructions given the previous day in open court in connection with the playing of other tapes, and seized upon defense counsel's earlier, qualified objection to the procedure as a basis for a plain error standard of review of this point. We urge, in view of the passage of one full day of deliberations between the earlier proceeding and the playing of the Mungovan-Kupau tape, that the ex parte instruction note quoted above must be the focus of the "cure" for this error. Moreover, there is no reason to assume, as the Court of Appeals assumed, that the defense objection to the trial judge's law clerk on this occasion (assuming consultation on this note) was not an unqualified one, especially in view of the absence of a record on the point. The Court of Appeals' "manifest injustice" standard of review of this point is vulnerable.

In *Rogers v. United States*, 422 U.S. 35, 39 (1975), Chief Justice Burger wrote for a unanimous Court: "[T]he jury's message should have been answered in open court and . . . petitioner's counsel should have been given an opportunity to be heard before the trial judge responded." See *Shields v. United States*, 273 U.S. 583, 588-89 (1927) ("rule of orderly conduct of jury trial"); *cf. Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919). An ex parte communication in the form of a jury instruction abridges an accused's right to be present under *Fed. R. Crim. P.* 43,[6] and the question is whether the error is harmless or not. The more complex question, not addressed by the Court of Appeals, is whether the two communications at issue here, both violative of Rule 43 and requiring harmless error determinations themselves, can be mustered in support of harmless error holdings on the related contamination points.[7]

In *Rogers* a deliberating jury asked if they could render a guilty verdict "with extreme mercy of the court" and the judge responded by ex parte note "in the affirmative." The error was not harmless because the note might have induced the verdict. Technicallly, the response wasn't

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6 This Court's analysis of the right to presence in *United States v. Gagnon*, 105 S. Ct. 1482, 1484 (1985), suggests strongly a *constitutional* right to presence for petitioner and his counsel at the time of delivery of the jury instructions challenged here, particularly since they are relied upon to ameliorate constitutional problems.

7 There is an issue whether *Smith v. Phillips*, 455 U.S. 209 (1982) (remedy for allegations of juror partiality "is a hearing in which the defendant has the opportunity to prove actual bias") overruled or reinterpreted *Remmer v. United States*, 347 U.S. 227 (1954) (presumptive prejudice), to place the burden of proving prejudice on the accused. *Compare United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985) (*Remmer* unaffected, burden on prosecution), *with United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984) (burden on defendant in light of *Phillips*). The resolution of this conflict, although desirable, would not likely affect the outcome of petitioner's case.

incorrect, but more should have been said: "At the very least, the court should have reminded the jury that the recommendation would not be binding in any way," 422 U.S. at 40. See *United States v. DeHernandez*, 745 F.2d 1305 (10th Cir. 1984) (reinstruction must be in open court with defendant present); *United States v. Burns*, 683 F.2d 1056, 1058 n.1 (7th Cir. 1982) *cert. denied*, 103 S. Ct. 821 (1983) ("the district courts in this circuit should make every effort to observe the procedures endorsed in the *Rogers* opinion"); *United States v. Walker*, 557 F.2d 741 (10th Cir. 1977) (ex parte note, "I cannot answer the request contained in your note. You must rely on your memories as to the instructions given," error not harmless); *United States v. Schor*, 418 F.2d 26 (2d Cir. 1969) (cited approvingly in *Rogers*).

The principle that emerges from these cases is that, when the subject matter of the ex parte instruction is important and the Rule 43 violation is thus serious, the error is not harmless even if the instruction is technically correct because the presence of the accused and the availability of adversary treatment might very well have produced a better communication and a different result. This principle cannot be reconciled with the holding in *Kupau*. The dictionary "cure" should have expressly countermanded the earlier dictionary note, and it should have been delivered in open court to insure that all jurors were aware of its command. The FBI agent instruction should have expressly forbade any conversation between the agent and the jurors.

Not only does the harmless error holding on the issue of the two notes discussed here conflict with *Rogers* and its progeny, but also the *Kupau* notes assume enormous importance because they must perforce support the harmless error holdings on the two contamination points dis-

cussed in subsections B and C, *supra*. The errors augment and aggravate each other.

E. This point merits a grant of certiorari jurisdiction.

Except for *Rogers v. United States*, 422 U.S. 35 (1975) (discussed in subpart D), this Court has not examined jury deliberation procedures in recent years.[8] The time of jury deliberations is probably the most important, and certainly the most sensitive, phase of the criminal trial. Petitioner Kupau's case presents an ideal opportunity to treat the three most vexing problems that arise during this phase: (1) Jury access to extrinsic but relevant material; (2) Proper delivery of supplemental instructions; and (3) Jury review of real evidence, particularly that of the electronic variety. Rarely, it is submitted, would one case present such an opportunity for clarification and settling of important, recurring questions of federal law.

This point presents the conflicts that were elaborated in subparts C and D *supra*. And in all its facets, which are interrelated because of the tape recording that caused and, at the same time, supported the prosecution of petitioner, its resolution by the Court of Appeals offends the Sixth Amendment.

CONCLUSION

For the reasons presented in these arguments, petitioner requests that the Court issue a writ of certiorari to review the judgment of the U. S. Court of Appeals for the Ninth Circuit entered in this case.

Respectfully submitted,
ADDISON M. BOWMAN III
Counsel for Petitioner

8 *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), disapproved an ex parte conversation between the trial judge and the jury foreman that "was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict."

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 83-1721

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WALTER H. KUPAU,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Filed February 3, 1984)

Defendant has filed a Motion for a New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and a Motion to Dismiss Count 3 of the Indictment. The United States has filed a Motion to Strike Defendant's Written Offer of Proof. The Court has studied the files and records of this case, reviewed the pleadings and affidavits submitted, listened to the arguments of counsel, and finds as follows:

I. *MOTION FOR A NEW TRIAL.*

A. *Findings of Fact.*

1. The jury list containing over two-thirds of the prospective jurors in this case was available to all counsel on approximately October 17 or 18, 1983, and the remainder of the list, encompassing less than one-third of the jurors on the voir dire panel, was available to counsel on October 24, 1983. Had counsel for the defendant called the United States District Court Clerk's office, he would have been informed that he had complete access to those jury lists, and the jury questionnaires covering those jurors, on the dates the lists were available.

2. There is no established past practice and procedure in this district, whereby either Magistrate Gedan, this Court, or any other judge from this district prior to voir dire examination, asks the attorneys involved if they have any challenges to the jury array.

3. In this case, defense counsel made no challenge to the jury array until after the jury had been selected.

4. There is no evidence before the Court as to the racial make-up of the jury array, or as to the division of the jury array between people who were born in the state of Hawaii, and people who were born outside of the state of Hawaii.

5. There is no evidence before the Court as to the race or place of origin of the jurors peremptorily excused by the government in this case.

6. There is no evidence before the Court that the procedures used in selecting the jury array result in the under-

representation of any distinctive group in the community due to systemic exclusion from the jury selection process.

7. There is no evidence before the Court that the Assistant United States Attorney who tried this case, or the United States Attorney's Office, has systematically excluded a particular group over a period of time in prior prosecutions by the use of peremptory challenges.

8. Whenever the Court received a communication from the jury during deliberations and did not respond in open court, but sent a communication to the jury during deliberations, the Court first consulted with both counsel, and received their input concerning both the jury's communication, and the Court's proposed communication. The Court, through its law clerk, called both counsel upon the receipt of a communication from the jury, read the communication, and solicited counsel's views as to an appropriate response. After the Court had considered the views of both counsel and decided upon a response, the Court then informed both counsel as to its decision, and again solicited their views, before the response was submitted to the jury. The Court similarly consulted and advised both counsel concerning the *sua sponte* communication to the jury in regard to taking back the dictionary. The Court was provided by its law clerk with a full statement of counsel's views; and allowed defense counsel to state its objection on the record, before the verdict was received. The objections noted by defense counsel in their affidavits in support of their Motion for a New Trial, are the same arguments and objections that were communicated by the law clerk to the Court, and placed on the record prior to reading the verdict. There was no practical way for the trial judge to recess

another jury trial over which he was presiding to allow defense counsel, who was not waiting in the vicinity of the courtroom and therefore had to come from his office over a mile away to place his objections on the record following each of the numerous communications made in response to jury inquiries.

9. In one of said such notes the jury asked for a "description of the transcripts." The government requested that the jury be informed that the transcripts arose from particular proceedings on particular dates. The defendant indicated that he wished to have the Court ask what the jury meant by "transcripts". The Court adopted the defendant's response.

10. When the Court was first advised that the jury had requested a dictionary, the Court was presiding over the same jury trial referred to above in paragraph 8. It was under these circumstances that the Court sent in a dictionary without first consulting either counsel.

11. When the Court sent the precautionary instruction with respect to the limited use of the dictionary and later removed the dictionary from the jury with another instruction telling them to disregard anything they had looked up, the Court took these actions only after consulting both counsel, through its law clerk, and soliciting their views on both actions. The Court informed both counsel that the dictionary would be removed and that the particular note would be sent to the jury before either was done.

12. The defendant objected to the Court's identifying for the jury Exhibits 5A, 5B, 5C, 6A, 6B, and 6C. The defendant further objected to the introduction of the dictionary into the jury room.

13. The dictionary sent in to the jury was a 1979 edition of Webster's New Collegiate Dictionary.

14. The only words looked up by the jury in the dictionary, during the course of their deliberations, were the words "response," and "consummate." The dictionary definitions of these words are contained in the exhibits attached to the affidavits of Mark J. Bennett, submitted by the Government in opposition to the defendant's motions.

B. *Mixed Questions of Fact and Law.*

1. Any error by the Court, in the manner in which it communicated with the jury, or in the manner in which it communicated with counsel and the defendant concerning communications from or to the jury, as well as all other proceedings and discussions, in open court, in the presence of counsel and the defendant, was harmless beyond a reasonable doubt.

2. Any error the Court may have made in its response to any jury notes, including the two jury notes concerning the transcripts, was harmless beyond a reasonable doubt.

3. Any error the Court may have made in sending the dictionary into the jury, including any error in not consulting counsel and the defendant beforehand, and any error in not conducting all proceedings in open court, in the presence of counsel and the defendant, was harmless beyond a reasonable doubt.

4. Any error the Court may have made in instructing the jury that the definitions contained in the Court's instructions were controlling was harmless beyond a reasonable doubt.

5. Any error the Court may have made in removing the dictionary from the jury, and instructing them to disregard anything they might have looked up, was harmless beyond a reasonable doubt.

6. The verdict was not contrary to the weight of the evidence, as the evidence of guilt, taking into account the credibility of the witnesses, including the defendant, was very strong.

7. There was no jury misconduct in this case.

C. *Conclusions of Law.*

1. Defendant claims that the verdict was contrary to the weight of the evidence. Taking into account the credibility of the witnesses, including the credibility of the defendant, the Court finds that the evidence of guilt in this case was very strong, and certainly not contrary to the weight of the evidence.

2. Defendant contends that he is entitled to a new trial because the verdict on Count 7 was inconsistent with the verdicts on Counts 1 through 6. The Court does not find the verdicts inconsistent, because the jury may have found that the two statements in Count 7 were not inconsistent. In any case, inconsistent verdicts do not require reversal, *Dunn v. United States,* 284 U.S. 390, 393 (1932), unless there is insufficient evidence to support the guilty verdicts. *United States v. Brooklier,* 685 F.2d 1208, 1220, (9th Cir. 1982), *cert. denied,* — U.S. —, 103 S. Ct. 1194 (1983); *United States v. McCall,* 592 F.2d 1066, 1068 (9th Cir.), *cert. denied,* 441 U.S. 936 (1979).

3. Defendant also claims that there was a miscarriage of justice because of the way the jury reached its verdict.

In this regard, defendant attaches to his motion what purports to be the report of a newscaster. As this is not an affidavit, it is not cognizable evidence, and the Court cannot grant a new trial based upon it. In addition, Rule 606(b) of the Federal Rules of Evidence provides that a juror's testimony or affidavit may not be used to impeach his verdict, unless it is with regard to extraneous, prejudicial information improperly brought to the jury's attention. Thus, even if the statement by the broadcaster was the affidavit of a juror, it would be incompetent to impeach the verdict.

4. Defendant challenges the voir dire array. The first time he raised this issue, however, was after the jury panel had already been selected. Whether this challenge is statutory or constitutional, it is untimely, and thus must be rejected on that ground. 28 U.S.C. § 1867(a) provides that if a defendant claims that the Jury Selection and Procedure Act has been violated, he must raise his challenge, at the very latest, prior to the start of voir dire. As he did not do so, any statutory challenge is barred as untimely. The Court also notes that the defendant has not submitted a sworn statement of facts to show a substantial failure to comply with the provisions of the Act, as required by 28 U.S.C. § 1867(d).

Though the Court has rejected any constitutional challenge on timeliness grounds, the Court notes that in order to make out a constitutional violation, the defendant must show "that a distinctive group is not represented on the venire in reasonable ratio to the percentage of that group in the community population, and that the underrepresentation is due to systematic exclusion from the jury selec-

tion process." *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). The defendant has submitted no evidence that any distinctive group in the community was not represented on the voir dire array in a reasonable ratio to the percentage of that group in the community. While he has submitted evidence as to the population of the community, the Court need not decide whether that evidence is cognizable, because the defendant has submitted nothing that goes to the ethnic or other make-up of the venire array. In addition, there is no evidence that any alleged underrepresentation is due to systematic exclusion from the jury selection process. Assuming defendant has made a constitutional claim, it must be rejected.

5. Defendant also objects to the actual make-up of the jury panel in this case. While he has again cited no racial or ethnic data, even had he done so, the mere fact that one particular jury panel does not mirror the community does not in any way entitle the defendant to relief. *See Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Ballard v. United States*, 329 U.S. 187, 192-93 (1946); *United States v. Grose*, 525 F.2d 1115, 1119 (7th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976).

6. Defendant claims, in an affidavit, that the prosecutor improperly exercised his peremptory challenges. This is the first time defendant has raised this claim, and the Court rejects it as untimely. In addition, the defendant has cited no evidence as to how the prosecutor used his peremptory challenges, and has not even provided the Court with the racial make-up of the jurors excused by the prosecutor. Thus, because defendant has failed to make any kind of a record, his claim must fail. Finally, the defendant bears a

"heavy burden . . . to establish a prima facie case of constitutionally impermissible use of peremptory challenges . . . by presenting a record of systematic exclusion of a particular group over a period of time in prior prosecutions." *Weathersby v. Morris*, 708 F.2d 1493, 1495-96 (9th Cir. 1983). *See Swain v. Alabama*, 380 U.S. 202, 227 (1965); *Hampton v. Wyrick*, 606 F.2d 834, 835 (8th Cir. 1979), *cert. denied*, 444 U.S. 1022 (1980); *United States v. Durham*, 587 F.2d 799, 801 (5th Cir. 1979). As defendant has made no showing of a systematic exclusion of a particular group over a period of time in prior prosecutions, his claim must be rejected.

7. Defendant has argued generally that the Court used an improper procedure in responding to jury notes. Defendant, however, has not cited any constitutional or statutory basis for his challenge. In addition, as noted in counsel's affidavit, during discussion of one of the first notes, counsel indicated that he wanted to discuss his objections with the Court, either on or off the record. It thus appears that his initial objection was that he had to talk to the Court through a law clerk because the Court was on the bench in another trial. As the Court has determined, all of counsel's objections were given to the Court, virtually verbatim, through the Court's law clerk. The Court, in making its decisions, with the exception of the request for a dictionary, had the full input of both sides. With regard to the jury note requesting a "description of the transcripts," the Court adopted the position of the defendant. When the jury specifically asked about exhibits 5 and 6, the defendant argued that the Court should repeat a precautionary instruction concerning one question

asked by a grand juror. The Court viewed this as inappropriate, since the jury had possessed copies of the transcripts from the start of deliberations, and the defendant's requested response was not responsive to the question.

The defendant's objections were before the Court. If all proceedings, including the actual communications with the jury, had taken place in open court, with the defendant and counsel present, this Court would not have ruled differently. With regard to procedure and substance for all notes communicating to the jury, the Court has carefully reviewed its procedures, the result of those procedures, as well as the evidence in this case. This Court concludes that if there were any error in not conducting all proceedings in open court, in the presence of counsel and the defendant, it was harmless beyond a reasonable doubt.

8. When the jury requested a dictionary, the Court furnished one, without consulting counsel. The Court is now advised that the only two definitions sought from the dictionary were "response" and "consummate." The Court finds that neither word could have possibly prejudiced the defendant in this case. The words are, if not completely irrelevant, virtually irrelevant to any of the main issues in this case, which were whether the union tried to organize C & W Construction, whether the defendant, in his phone conversation with Mungovan, asked him to sign a union agreement, and whether the defendant lied in his affidavits and on the witness stand. The definitions are also irrelevant to any peripheral issues. The fact that the jury looked up the definitions of these two

words could not in any way have prejudiced the defendant, especially as it would have been well within the Court's discretion to either furnish, or not further [sic] the definitions, had the jury directly requested them. This Court therefore concludes that any error in sending in the dictionary, any error in not consulting counsel and the defendant, and any error in not conducting proceedings in open Court, in the presence of counsel and the defendant, was harmless beyond a reasonable doubt. Additionally, the Court believes that taking into account the credibility of the witnesses, including the credibility of the defendant, the evidence of guilt in this case was very strong, and this reinforces the Court's view that any error was harmless beyond a reasonable doubt.

The Court notes additionally that before giving the precautionary instruction to the jury that the Court's instructions control over any dictionary definitions, the Court consulted both counsel and told them of this proposed precautionary instruction. Finally, when the Court decided to remove the dictionary and tell the jury to disregard anything that they had looked up, it did so only after consulting both counsel and soliciting their views on this question of law. If there was error in not doing this in open court, in the presence of the defendant, or in not actually giving the instructions to the jury in open court, any error was harmless beyond a reasonable doubt, as the Court's instructions were a correct statement of the law. In addition, as neither of the words the jury looked up conflicted with the Court's instructions, the instructions could have had no prejudicial effect. Regardless of any additional objections that might have been raised in open court, the Court would have given the instructions it did.

Defendant argues further that sending the dictionary to the jury warrants a new trial in and of itself. Assuming that sending a dictionary into a jury may be error, caselaw suggests that it is not error *per se*. *See United States v. Gunter*, 546 F.2d 861, 869 (10th Cir. 1976); *United States v. Duncan*, 598 F.2d 839, 866 (4th Cir. 1979). In this case, the judge affirmatively instructed the jury first, that no definitions in the dictionary could control over actual definitions that the judge gave in his instructions, and then later instructed the jury to disregard the dictionary completely. Such instructions have been held to cure potential error arising from the jury consulting a dictionary. *See Gates v. L. G. DeWitt, Inc.*, 528 F.2d 405, 413 (5th Cir. 1976). In addition, the jury foreperson responded affirmatively to the Court's question to her as to whether the jury had followed its precautionary instructions.

Ninth Circuit case law suggests that where extraneous evidence is introduced into the jury deliberation room, the burden is on the government to show harmless error. See *U.S. v. Bagley*, 641 F.2d 1235, 1240 (9th Cir. 1981); *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980). Rule 606(b) of the Federal Rules of Evidence, while it would not allow a juror to testify about the way in which the dictionary definition was used, does allow a juror to testify as to what was consulted, as it constitutes potentially extraneous, prejudicial information. In *United States v. Duncan, supra*, 598 F.2d at 866, the Court specifically held that Rule 606(b) allowed a juror to testify as to a jury definition that she had related to the rest of the jury. Thus, pursuant to Rule 606(b) of the Federal Rules of

Evidence, members of the jury are competent to testify as to what they looked up. *See Gates v. L.G. Dewitt, Inc.*, 528 F.2d 405, 413, *modified on other grounds*, 532 F.2d 1052 (5th Cir. 1976).

In this case, the government produced affidavits of three jurors, and the affidavit of U.S. Attorney Mark Bennett summarizing the statements of six other jurors to him on the question of the words looked up. The affidavits indicate that the only words that the jury looked at in the dictionary were the words "response" and the word "consummate." This Court cannot find any prejudice to the defendant from the extraneous introduction of the dictionary definitions of these words into the jury deliberation room. Thus, this Court finds that it can be concluded beyond a reasonable doubt that the extrinsic information introduced by use of the dictionary did not contribute to the verdict.

ACCORDINGLY, the Motion for a New Trial is hereby DENIED.

II. *MOTION TO DISMISS COUNT 3 OF THE INDICTMENT.*

On December 15, 1983, the defendant filed a Motion to Dismiss Count 3 of the Indictment, on the ground that Judge Walter Heen did not exercise the judicial power of the United States, and therefore was not empowered to sign an order to show cause. The Court believes that this was a motion that had to be filed pretrial, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, and thus is untimely. Even if this was a motion cognizable post-trial, it was either a Motion for a Judgment of Acquittal pursuant to Rule 29, or a Motion in Arrest of Judg-

ment pursuant to Rule 34. Either of these motions has to be made within seven days of verdict, and thus again the defendant's motion is untimely. Further, even if the defendant's motion were timely, the Court would reject it.

In this case, Judge Heen's status in no way affects Count 3 of the indictment. Judge Heen was not the individual who administered the oath to the defendant. The perjury statute, 28 U.S.C. § 1621, requires only that an "oath be taken before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." and this Court has already ruled that the defendant's oath was authorized by a law of the United States. Section 10(1) of the National Labor Relations Act, 29 U.S.C. § 10(1), ordering the union to respond to the allegations of the NLRB. The perjury statute does not require that the oath be administered pursuant to an order by an Article III judge. Even if Judge Heen did not have the power to exercise the judicial authority of the United States, that is irrelevant in this case.

ACCORDINGLY, the Motion to Dismiss Count 3 of the indictment is hereby DENIED.

III. *MOTION TO STRIKE WRITTEN OFFER OF PROOF.*

The government has moved to have the defendant's written offer of proof of Dr. Shuy's testimony stricken on the grounds that (1) if the U.S. Attorney had been served with the written offer of proof, he might have reconsidered his position on the admissibility of the testimony, or at least would have asked that the defendant choose between his oral and written offers of proof; (2)

this Court's ruling might have been different had its ruling been based on the written offer of proof, rather than the oral offer of proof.

The government argues that striking the document is an appropriate sanction for failing to serve the document under Rule 49. Rule 49 states:

> (a) *Service: When Required.* Written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.

The defendant admits that serving the document would probably have been the wiser course, but points out that Rule 103 of the Federal Rules of Evidence provides that:

> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer.

Defendant argues that Rule 103 does not require service on the other party.

It is unclear whether Rule 49 applies to written offers of proof made by leave of court. In any event, the government has not shown any specific prejudice due to purported inconsistencies between the oral and written offers of proof.

As to this Court's ruling on the admissibility of Dr. Shuy's testimony, this Court has read the written offer of proof, and concludes that it does not change this Court's ruling. The Ninth Circuit has stated that two elements

are required for the admissibility of expert testimony going toward the ultimate issue of the defendant's criminal intent. In *Fineberg v. United States,* 393 F.2d 421 (9th Cir. 1968), the defense sought to have the testimony of an accountant introduced to suggest that state of the defendant's records suggested no intent to commit mail fraud. The *Fineberg* court observed:

> First, the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average laymen, and second, the witness must have such knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

Id. at 421.

In this case, this Court ruled that the testimony of a linquist as to the meaning of the words spoken by Mr. Kupau, and the "clues to his intent" to be gleaned from those words, was not the type of testimony which was required to assist the trier of fact in its search for the truth.

Short of any showing of actual prejudice to the government or to this Court's original ruling, the Motion to Strike is DENIED.

SO ORDERED.

DATED: Honolulu, Hawaii, Feb. 02, 1984.

/s/ HAROLD M. FONG

UNITED STATES DISTRICT JUDGE

CIVIL NO. 83-1721

U.S.A. v. WALTER H. KUPAU

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1034

D.C. No. CR 83-1721 HMF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER H. KUPAU,

Defendant-Appellant.

OPINION

(Filed January 28, 1986)

Appeal from the United States District Court
For the District of Hawaii

Harold M Fong, District Judge, Presiding

Argued and Submitted December 10, 1984

San Francisco, California

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges. HUG, Circuit Judge:

Walter H. Kupau appeals his conviction for three counts of perjury under 18 U.S.C. § 1621 (1982) and three counts of false declaration under 18 U.S.C. § 1623 (1982). Kupau maintains that he was denied a fair trial because the district court (1) allowed an FBI agent to play tapes for the jury with no one present to record communication between the jury and the agent, (2) communicated *ex parte* with the jury, (3) contaminated the jury by giving it a dictionary, (4) refused to allow Kupau to introduce the

expert testimony of a linguist, and (5) committed error in excluding portions of the defense's proffered testimony of a labor law attorney. We disagree with Kupau's contentions and affirm his convictions.

BACKGROUND

On January 6, 1981, Local 745, United Brotherhood of Carpenters and Joiners of America, AFL-CIO began picketing C & W Construction Co. ("C&W"), a nonunion firm. The chief executive officer of C&W was Walter Mungovan. Defendant Kupau, who was the statewide head of the union, characterized the purpose of the picketing as informational, *i.e.*, intended to alert the public that C&W paid below union scale wages. Mungovan filed a complaint with the National Labor Relations Board ("NLRB") alleging that the purpose was not informational but organizational. Informational picketing may continue indefinitely but organizational picketing must culminate in a request for election pertaining to union representation by the targeted work force at least within thirty days from the commencement of the picketing. The NLRB agreed with Mungovan and sought to enjoin the picketing in federal district court.

Kupau opposed the NLRB action and submitted to the court affidavits that the picketing was solely informational. Kupau also testified at the perjury trials of other union officials that the picketing was not organizational. These characterizations conflicted with conversations—covertly taped by Mungovan—between Mungovan and Kupau, and between Mungovan and various Kupau subordinates. Counts one through three were based

on the affidavits. The remaining four counts alleging false declarations resulted from Kupau's testimony at the trials of the other union officials. The jury convicted Kupau of six of the seven counts.

ANALYSIS

A. *FBI Agent's Presence*

As noted above, certain taped conversations were important evidence in the case against the defendant. The jury desired to hear these conversations again during its deliberations and requested that the court provide someone capable of running the tape player. At a hearing outside the jury's presence, the court decided to allow FBI Agent Hilton Lui to play the tapes for the jury. Lui had played no role in the trial, but apparently had sat at the Government's table during a portion of the trial. Counsel for the defense objected to Lui for this reason.

The jury returned to the courtroom after the hearing and was informed by the court that Lui would act as the tape machine technician. The court instructed the jury that Lui "will be here only for the purpose of playing the Nishibayashi tape and the Torres tape. That's just so that by accident somebody doesn't erase the tape and, you know, be in trouble. But, he cannot answer any questions, so don't even talk to him. He'll just be here like a nonentity. And he can't comment as to any evidence . . . ." The district judge also announced that he would clear the courtroom of all but the jury and Lui for the playing of the tapes, which he did. The judge also requested that Lui run the tapes for the jury on a second occasion.

On appeal the defense argues that it violated the sixth amendment for the court to allow "an FBI agent and the jurors to be alone together without a record of what was said." This argument is new. The defense did not object because the agent and the jury were to be alone in the courtroom during the tape playing. Nor did the defense object because Lui was an FBI agent. The sole reason given the judge to consider in ruling on the objection to Lui was that Lui had sat at the Government's table during the trial, a point not pressed on appeal.

The ground cited on appeal was not raised during the hearing, prior to sentencing when counsel were given further opportunity to "make a record" for appeal, or as part of the motion for a new trial. Where the district court has been denied the opportunity to consider an issue, the appellate courts will not entertain it absent manifest injustice. *Professional Seminar Consultants v. Sino Am. Tech.*, 727 F.2d 1470, 1472 (9th Cir. 1984).

There was no objection made to playing the tapes, which the jury quite understandably wished to hear again. There was a problem in providing someone able to operate the equipment and to ensure that the tape would not be erased or otherwise damaged. The judge solved this practical problem by permitting Lui to operate the tape machine but with cautionary instructions. There was no request that the judge or a reporter or counsel remain while the tape was being played to ensure that there was no communication with the jury.

After a case has been submitted to a jury, there are serious concerns about any outside contact with the jury.

Special care is taken by the bailiffs and marshals during meals or when attending to the personal needs of the members of the jury to ensure that the jury deliberation is free from outside influence. Here there was a risk that someone associated with the prosecution, while alone with the jury after submission, could, in some fashion, influence its deliberations. In hindsight it would have been better to have run the machine in open court with the reporter, the judge, counsel, and the defendant present. The defense made no objection to the clearing of the courtroom of all but the jury and Lui.

If the jury and Lui followed the instructions of the judge that Lui operate the machine solely as a mechanic and be treated as a non-entity, there was no improper influence on the jury. There is no indication that the instructions were not followed. There is only the potential danger of outside influence on the jury deliberations and the lack of the presence of the judge, counsel, or a reporter to verify that nothing untoward did occur.

With appropriate cautionary instructions having been given and no indication that they were not followed, and with no request having been made for a reporter, the judge, the defendant, or counsel to remain in the courtroom, we find that the procedure followed does not require reversal.

It is apparent that the district court viewed the tape playing as merely mechanical assistance to enable the jury to hear the evidence as a part of the jury's deliberation and not as "a stage of the trial" under Fed. R. Crim. P. 43, at which the presence of the defendant was required. However, the procedure is more properly viewed as a

stage of the trial at which the presence of the defendant is required. It differs from the kind of technical assistance rendered by the marshals in dealing with the physical needs of the jury, because it involves the crucial jury function of reviewing the evidence. The defendant did not raise this objection in the district court but has raised it on appeal. We will therefore consider the matter under the plain error standard. We recognize that the defendant had a right to be present when the tape was being played, and this was a right which could not be waived by counsel. *Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972). It was error to permit the playing of the tape without defendant's personal waiver of his right to be present, and it was also error to permit the replay without a reporter present to make a record. Similar errors were, however, held harmless beyond a reasonable doubt in *Bustamante v. Cardwell*, 497 F.2d 556 (9th Cir. 1974). In this case, given the court's emphatic cautionary instructions, the obvious efforts of the court, by clearing the courtroom, to prevent any outside influences, and the absence of any suggestion that extraneous matters came before the jury, we similarly hold that the error was harmless beyond a reasonable doubt.

B. *Judge-Jury Ex Parte Communication*

During the deliberations the jury sent a series of notes to the court. These ranged in nature from innocuous requests for bus fare, gas money, or early adjournment of the day's deliberations to queries concerning the identities of various witnesses and other substantive matters.[1]

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[1] We discuss the requests and responses with regard to the dictionary separately in the following section. The

(Continued on following page)

The court informed both Government and defense counsel of each substantive request and obtained their suggested responses. When the court had prepared a response, counsel were informed of its decision and their views were again solicited, before the court finally submitted the response to the jury.

Rule 43 of the Federal Rules of Criminal Procedure provides that "the defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict . . . ." That right is not absolute, however, and even involuntary absence may be harmless error. *United States v. Ford,* 632 F.2d 1354, 1378 (9th Cir. 1980). The absence of the defendant during a portion of the trial proceedings is harmless error if there is no reasonable possibility that prejudice resulted from the absence. *United States v. Birges,* 723 F.2d 666, 670 (9th Cir.), *cert. denied,* 104 S. Ct. 1926 (1984); *cf. United States v. Ford,* 632 F.2d 1354, 1378-79 (9th Cir. 1980); *cf. United States v. Cassasa,* 588 F.2d 282, 285 (9th Cir. 1978). If the absence of the defendant constituted a constitutional violation, such as a sixth amendment confrontation violation, or was of such significance as to constitute a fifth amendment due process violation, then the Government would be required to prove that the error was harmless beyond a reasonable doubt. *United States v. Gagnon,* 721 F.2d 672, 678 (9th Cir. 1983).

(Continued from previous page)

other substantive queries and responses are set forth in the appendix.

In this case, the judge's communication with the jury did not involve a constitutional violation, and thus we examine the circumstances of the absence of the defendant in this case to determine if there was a reasonable possibility of prejudice. The judge solicited counsel for the defense and for the Government for their comments and objections to all substantive responses he proposed to give to the jury. The defense was given the opportunity to object to each substantive communication before it was relayed to the jury. Moreover, before the jury announced its verdict, the court, in no uncertain terms, gave the defense the opportunity to make a record for appeal. Neither at that time nor during its motion for a new trial did the defense argue that a particular communication was substantively improper. Nor does the defendant now disagree with the substance of any of the answers. His generalized complaint amounts to a request that this court establish a per se rule that any *ex parte* communication in the defendant's absence requires reversal, a request that must fail in light of the authority that reversal is not required when there is no reasonable possibility of prejudice.

The opportunity afforded defense counsel to suggest appropriate responses to jury questions and to state objections to each substantive response formulated by the court, as well as the lack of any showing that the responses were substantively incorrect or in any way prejudicial, lead us to conclude that the presence of the defendant would not have affected the outcome, or, indeed, even the substance, of the communications. Thus, we find no reasonable possibility of prejudice.

C. *The Dictionary*

We now consider whether it constituted reversible error for the district judge, in response to a jury request, to give to the jury a dictionary without consulting counsel. The judge gave the jury the dictionary with the cautionary instruction that "where the court has provided you with definitions and explanations of terms in its instructions to you, those definitions and explanations must control. You must not resort to the dictionary definition for guidance in interpreting the terms defined for and explained to you in the court's instructions." Shortly thereafter the district judge reconsidered and removed the dictionary with the following direction: "You are instructed that you must disregard completely any and all definitions obtained from its use. You are to base your decision solely upon the evidence admitted during trial and the instructions given to you at the end of the testimonial portion of the trial."

In *United States v. Birges,* the defendant also challenged the trial court's accession to a request for a dictionary, complaining that a "dictionary is a supplemental instruction, requiring counsel to be informed and defendant to be present, pursuant to Fed. R. Crim. P. 43." 723 F.2d at 670. We agreed that giving the dictionary to the jury was error and noted that "[q]uestions or disputes as to the meaning of terms which arise during jury deliberations should be settled by the court after consultation with counsel, in supplemental instructions." *Id.* at 670-71. We did not reverse, however, since the record did "not demonstrate that any prejudice occurred as a result" of the introduction of a dictionary into the jury's deliberation. *Id.* at 671.

The district judge, in this case, erred in giving the dictionary to the jury. Reversal is inappropriate, however, absent a showing of prejudice. There has been no such showing in this case. In addition to the cautionary and curative instructions, the Government submitted affidavits from three jurors stating that the dictionary was consulted for the definitions of only two words, "response" and "consummate," neither one critical in this case involving informational and organizational picketing, and perjury.[2] The judge's error in this case was harmless.[3]

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2 The Government attorney also submitted his own affidavit reporting conversations he had with six other jurors, which were consistent with the affidavits of the three jurors.

3 Defendant argues that providing the dictionary to the jury constituted a violation of the confrontation clause of the sixth amendment and that the Government must therefore prove absence of prejudice beyond a reasonable doubt. Defendant argues that this determination of prejudice should be made in terms of the factors enumerated in *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981). Those factors were: (1) strength of the Government's case; (2) the importance of the extraneous evidence; and (3) the trial judge's assessment of the error. Even if we were to apply these, our finding would be the same. The Government's case was clear-cut. The words whose definitions were ascertained had negligible bearing on the case. Finally, the judge assessed the error as harmless. He found the credibility of the Government's witnesses superior to that of Kupau's and noted that, while the jury took a number of days to reach its verdict, he "never had any doubt at any time that [the jury] might have been deadlocked. . . . [J]udging from the notes it seemed that [the jury had] made a very systematic and methodical consideration of facts."

D. *Exclusion of Expert's Linguistics Testimony*

The Government introduced the testimony of Thomas W. Cestare concerning the law governing informational and organizational picketing. The parties stipulated that Cestare, who headed the Honolulu office of the NLRB, was an expert in the fields of labor law, labor management relations, and collective bargaining agreements. During his testimony, Cestare gave his explanation of the meaning of certain labor law terms used by Kupau in his taped conversations with Mungovan. These opinions constituted relevant, probative evidence harmful to Kupau. To rebut the negative inference to which this interpretation of these tapes gave rise, the defense attempted to introduce the expert testimony of a linguist, Roger Shuy. The court excluded the proffered testimony as unnecessary. (*See* Fed. R. Evid. 702 (Expert testimony admissible where it "will assist the trier of fact to understand the evidence or to determine a fact in issue.")).

A "district court's decision to exclude expert testimony will be upheld unless manifestly erroneous." *United States v. Byers*, 730 F.2d 568, 571 (9th Cir.), *cert. denied*, 105 S. Ct. 223 (1984). The district court's decision was not manifestly erroneous. Shuy would have testified as to Kupau's intent based on the expert's analysis of an ordinary, brief conversation from aspects such as linguistics, discourse analysis, conversational analysis, structural analysis, topic recycling, topic clustering, response analysis, referencing analysis, language function analysis, and contrastive analysis. Such testimony was aimed not at explaining technical terms used in the conversation, as was the testimony of the labor expert. Instead, this

expert sought to interpret language in ordinary usage, which the district court found would have confused, not assisted, the jury. We find that it was not error to exclude Shuy's testimony. *See United States v. Hearst*, 563 F.2d 1331, 1349-50 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (exclusion of expert linguist's testimony upheld); *see also United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 705 (1984) (exclusion of expert linguist's testimony upheld).

E. *Exclusion of Other Testimony*

The prosecution introduced the testimony of Dennis Chang, an attorney for the union. Chang had drafted the affidavits that Kupau signed and submitted to the court. These affidavits formed the basis of counts one through three. The defense sought on cross-examination to elicit from Attorney Chang whether, at the time of the signing, Chang "believed that Mr. Kupau believed [the affidavits] to be true." The prosecution objected and the court sustained the objection. In the absence of an offer of proof of what the testimony would have been, and there was none in this case, reversal will lie only where there is plain error. Fed. R. Evid. 103. Since Chang's opinion of Kupau's state of mind would have constituted speculation, the judge did not plainly err in excluding it. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Fed. R. Evid. 602. At the time of the questions and objections, no testimony had been introduced that Kupau had made statements to Chang revealing his state of mind. Further, as the district court noted, the opinion of Kupau's beliefs

held by Chang at the time he drafted the affidavits was irrelevant.

CONCLUSION

The contentions of the defendant are without merit. The judgment of the trial court is AFFIRMED.

APPENDIX

The substantive queries and relevant responses were as follows:

Q: 1) We would like to request a copy of the judge's instruction to the jury.

A: 1) [A]ttached hereto is a copy of the court's instructions to the jury as read to you on this date.

Q: 2) Could we please have the following

1. List of the witnesses and the order they appeared?

. . . .

3. Transcript of present trial?

A: 2) 1. List of witnesses is attached

. . . .

3. A copy of the transcript for this trial cannot be provided. Please be informed that it would take several weeks for the court reporters to transcribe their notes for the entire trial. You are therefore requested to recollect to the best of your ability the testimony in this trial.

Q: 3) Could we please have a list of descriptions of the transcripts before us?

A: 3) I have consulted with the attorneys on . . . your request, and the attorneys wish me to ask you the following questions:

1. What do you mean by "transcript," and

2. What do you mean when you say "description" of the transcript. Please identify the exhibit numbers of the "transcripts" you are referring to.

Q: 4) We would like the lists of the plaintiff's and defendant's exhibits with numbers, dates, and

a brief description. I.e., Defendant's exhibit 44—Whose house, what date? (photo)

A: 4) I have contacted both attorneys to require their presence in this courthouse, in order that they review each others' description of their exhibit list, as to whether the description given actually complies with the testimony presented in court.

This procedure, however, will necessarily require more than an hour to complete, as certain attorneys will have to come from their office to the courthouse.

With reference to certain exhibits as to photos, and your request of its description and date, both attorneys will have to recall whether or not such testimony was given.

In the event there was no actual testimony given in court, none can be provided now, because the trial has concluded.

Q: 5) Please refresh our memory . . . who was witness Gordon Yanagawa (his present and/or past working position for whom?)? Also the same for Dennis Yoshida?

Would you please furnish someone to play the reel-to-reel tapes for us?

Could you please tell us the job titles and companies connected with witness William Bothelho, Jack Craig, Don Horio, James Westlake?

A: 5) [Witness identifications given by respective counsel during special hearing. Hilton Lui furnished to play tapes, as discussed in opinion.]

Q: 6) Would you please identify Gov exhibits' 5A, 5B, 5C, 6A, 6B, and 6C?

A: 6) All transcripts starting with "5" refer to excerpts of the September 3, 1982 grand jury testimony of Walter Kupau.

All transcripts starting with "6" refer to excerpts from the May 11, 1983 trial testimony of Walter Kupau.

Q&A: 7) [These concerned the dictionary and are discussed in opinion.]

Q: 8) Could we please listen to the enhanced version of the tape between Mr. Mungovan and Mr. Kupau of Feb. 27, 1981 [and] Defendant's exhibit 20 and Government exhibit 35 after lunch? (Approx. 2 P.M.)

A: 8) [Y]ou are advised that the enhanced version of the Mungovan/Kupau tape will be played as you have requested with the same technician in the person of agent Hilton Lui, providing the technical assistance in this case. You are cautioned, as previously, that agent Lui will not be allowed to answer any questions, and his presence during the time of the replay will only be for the purpose of technical assistance.

Q: 9) Would you please clarify in laymen's terms the 4 points for decision in number 7?

A: 9) You are instructed that you must base your verdict on the instructions as given to you at the close of testimonial portion of the trial. I am not permitted to clarify the instruction in the manner that you have requested.

Q: 10) Does the attached page refer to Count 1-6? 1-7? Only 7? If the latter is true, does this page have jurisdiction over the 4 elements or are they equal in making our decision? (Please return the page.)

A: 10) You should know that this page is the applicable statute for count 7 only.

The four elements on which you were instructed constitute the elements each of which the government must prove beyond a reasonable doubt, in order to obtain a conviction under this statute. Before you may return a verdict of guilty for count 7, you must find that the government has proven each of the four elements beyond a reasonable doubt.

Non-substantive notes requested such items as chalk, a blackboard, an eraser, paychecks, a pencil sharpener, masking tape, coffee cups, and adjournment for lunch or for the day.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO. 84-1034

D.C. NO. CR 83-1721 HMF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER H. KUPAU,

Defendant-Appellant.

ORDER

(Filed March 25, 1986)

Appeal from the United States District Court
for the District of Hawaii

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges

The Opinion in this case, decided January 28, 1986, (781 F.2d) is amended as follows:

1. The paragraph commencing at 781 F.2d 744, column 2, line 30,* and footnotes 2 and 3 are deleted. In place of the deleted language, the following paragraph is substituted:

> The district judge in this case erred in giving the dictionary to the jury. The Government had an obligation to prove that the presence of the dictionary was harmless beyond a reasonable doubt. *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981). In addition to the cautionary and curative instructions, the Government submitted affidavits from three jurors stating that the

*Slip op., p. 10, last paragraph.

dictionary was consulted for the definitions of only two words, "response" and "consummate," neither one critical in this case involving informational and organizational picketing and perjury. The Government attorney also submitted his own affidavit reporting conversations he had with six other jurors, which were consistent with the affidavits of the three jurors.

The considerations set forth in *Gibson* in evaluating whether there was a reasonable doubt that the extrinsic material influenced the verdict were (1) the strength of the Government's case; (2) the importance of the extraneous evidence; and (3) the trial judge's assessment of the error. Here, the Government's case was clear-cut. The words whose definitions were ascertained had neglible bearing on the case. Finally, the judge assessed the error as harmless. He found the credibility of the Government's witnesses superior to that of Kupau's and noted that, while the jury took a number of days to reach its verdict, he "never had any doubt at any time that [the jury] might have been deadlocked. . . . [J]udging from the notes it seemed that [the jury had] made a very systematic and methodical consideration of facts." We conclude that the error was harmless beyond a reasonable doubt.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO. 84-1034

D.C. NO. CR 83-1721 HMF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER H. KUPAU,

Defendant-Appellant.

ORDER

(Filed April 17, 1986)

Appeal from the United States District Court
for the District of Hawaii

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.